



Alert: The New California Piece Rate Legislation Could Significantly Impact the Salon Industry

On January 1, 2016, a number of new California employment laws went into effect, including AB 1513 addressing piece-rate pay issues. You would not be alone if your salon quickly dismissed AB 1513 as inapplicable—either because you use independent contractors (not employees) or because you pay your employees on a commission basis. However, to best protect yourself and your salon, we urge you to read on and learn how AB 1513 may have a greater impact on your salon than you first considered.

Overview of AB 1513

A “piece rate” pays a worker a fixed amount, or perhaps a fixed percentage, for each “piece” of work completed. An example is paying an employee \$50 for each head of hair that is cut or styled, whether or not the employee brought the client in the door. AB 1513 clarifies that California employers must pay “piece rate” employees a separate hourly wage for all “nonproductive time” (“NPT”) that is worked, as well as for rest and recovery periods. And, depending on your compensation structure, the rates due for NPT, versus for rest/recovery periods, may be different! These are significant changes. Previously, many employers understood that paying employees *only* a piece rate was proper, so long as at the end of the day an employee averaged at least minimum wage for all time worked.

As background, two California appellate court decisions issued in 2013 (*Bluford v. Safeway* and *Gonzalez v. Downtown LA Motors*) established that employers had to pay piece-rate employees separately for NPT (even though there was no clear definition of NPT), and for rest and recovery time. These decisions spurred numerous lawsuits and created massive retroactive liability for employers using piece-rate pay systems. AB 1513 was passed in response to *Bluford* and *Gonzalez*, to try to provide employers with greater certainty including by establishing a broad definition for NPT, and outlining how to calculate rest time. It also created safe-harbor provisions to try and minimize potential litigation against employers as a result of the statutory changes. While the lawmakers who authored the law did not specifically intend that it apply to the salon industry, the generally-applicable language of the new statute makes clear that it may have broad implications.

First Question: Are My Independent Contractors Actually “Piece Rate” Employees Subject to AB 1513?

The first question to ask is whether your stylists are properly classified as employees or independent contractors. California law treats independent contractors differently than employees in regards to payment, taxes, reimbursement for business expenses, and more. The California Division of Labor Standards Enforcement (“DLSE”) uses a multi-factor “economic realities” test to determine whether a worker is properly classified (view the test [here](#)). Unfortunately, there is no golden rule that can be applied to guarantee employees will be properly classified, and all of the facts in each case must be

considered and weighed. Misclassification may expose a company to a significant risk of liability including, now, the risk that a true employee, who was misclassified as an independent contractor, should have at all times been earning both a “piece rate” and, separately, certain hourly payments for rest, recovery and other nonproductive time.

Second Question: Are My Employees Earning a “Piece Rate” or a True Commission?

A piece rate is viewed by the DLSE as an ascertainable figure paid for completing a particular task, and an employee earning a piece rate is understood to be paid according to the number of “units” turned out or completed. On the other hand, Labor Code § 204.1 defines commissions as: “Compensation paid . . . for services rendered in the **sale** of such employer’s property or services and based proportionately upon the amount or value thereof.” The DLSE opines that if compensation is based on the percentage of a sale, it is a commission, but if it pays employees for the number of pieces of goods finished or the number of appointments made, it is a piece rate. Regardless of what you *call* your compensation system, if you are in effect paying a piece rate according to this definition, AB 1513 applies.

IF AB 1513 Applies: Now What?

NPT Defined

A key element of AB 1513 is its definition of NPT, defined as “time under the employer’s control, exclusive of rest time and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis.” This definition is exceptionally broad by necessity. There are numerous industries that use piece-rate systems, and each industry, or each employer, may utilize a different means of establishing piece-rate pay. For example, some employers may use “group piece-rate” calculations for finished pieces, where another will pay employees for individual production.

Despite the built-in ambiguity, AB 1513 does establish two important guideposts: NPT must be time under the employer’s control, and it cannot be “directly related” to the piece-rate activity. Therefore, activities such as cleaning the floor after a haircut are likely “directly related” to the piece-rate activity of styling a customer’s hair and would not be classified as NPT. But waiting substantial time for a customer to walk in the door does not directly relate to the activity, and may be considered NPT. What constitutes NPT will be a highly factual case-by-case determination for each company.

AB 1513 requires NPT be paid out at an hourly rate no less than the applicable minimum wage, however an employer can choose to pay a different, higher contractual hourly rate. As for tracking time, an employer has two options: (1) make a **good faith estimate** of the amount of NPT worked by each employee taking into account all facts and circumstances, record that amount and pay employees based on that amount; or (2) actually track employees’ NPT, record that amount and pay employees based on that time. In the first option, if an employee challenges the amount of NPT and the estimate is found to be in error and **not** in good faith, the employer may be subject to civil penalties. Paystubs must separately and accurately account for all NPT, and include the rate at which NPT is paid.

Rest Time Calculation

Rest time must be calculated separately from other NPT and can be more complicated. For pay periods in which an employee is engaged in piece-rate activity, rest and recovery time must be paid at an hourly rate no less than *the greater of* the applicable minimum wage, or the employee's average hourly wage for all time worked (exclusive of break time) during the work week. The latter, which is more likely to apply in industries where the piece rate is typically generous, is calculated by dividing the employee's *total* compensation for the workweek (not including rest/recovery time and overtime premium), by the *total* hours worked (not including rest/recovery time). The statute requires a weekly accounting of the rest time calculation, and the calculation must be reflected on paystubs.

Common Industry Practices That Need To Be Considered

Two common payment practices may create liability down the road for salons. First, many salons operate by "renting" a booth or chair in the salon to a stylist, characterized as an independent contractor. In exchange for use of facilities, and possibly various equipment, staff, and other amenities, the salon charges an agreed-upon rate for the chair. This setup will probably avoid any problems under AB 1513, but salons may encounter challenges based on the stylist's classification as an independent contractor. For example, if the salon exercises sufficient control over the terms and conditions of the stylist's work, if the stylist believed he/she was entering an employer-employee relationship with the salon, the service agreement was continuous, and other factors suggest the stylist is really an employee, then the stylist should properly be classified as an employee. In the event of misclassification, a potential claim is that the salon did not comply with wage and hour laws including the new "piece rate" payment obligations. Also, salons deciding to reclassify independent contractors as employees should consider whether the new proposed compensation structure will include a piece rate component, requiring compliance with AB 1513.

Second, a number of salons pay their stylists a "commission" based on the number of haircuts or other services they perform. This compensation system has some inherent risk. On paper, paying a stylist a certain amount of money, even if calculated as a percentage of the sale, for a haircut, some other amount for coloring, and other specified amounts for other services sounds like commission. But consider the auto industry, where mechanics are frequently paid on a piece-rate basis. Typically, each task (changing the oil, replacing a windshield, rotating the tires) is designated a number of hours it should take to complete. The mechanic is paid an "hourly rate" for the number of hours assigned to each completed task, regardless of how long it actually takes to complete the task. This is very similar to the commission system described above where each task (cuts, coloring, highlights, etc.) allocates a certain sum to the stylist. This may be considered a piece-rate system in the eyes of the law, and you may be subject to AB 1513's requirements.

Safe-Harbor Provisions

Some good news is that AB 1513 includes a safe-harbor provision to limit the impact of the retroactive liability based on the appellate court decisions. Complying with the provision may not be easy, and it may be costly, so it is recommended that you "run the numbers" to see if the provision is right for your salon.

To be covered by the safe-harbor provision, an employer must complete two steps. First, by July 1, 2016 the employer must provide written notice to the DLSE of the employer's intent to make payments under the provision. Notice can be provided on the DLSE's website. Second, the employer must compensate each piece-rate employee for rest and recovery periods and other NPT that the employees are due from July 1, 2012 through December 31, 2015. There are two calculations employers may use to satisfy this requirement. The calculations are spelled out in detail in the statute, available [here](#). Whichever option an employer chooses, the payments must be made to the affected employees by December 15, 2016.

Conclusion

Running a business is not easy, and although AB 1513 may not be perfect, it brings some much needed clarification to the law. Using AB 1513 as a guide, employers can make changes now to prevent problems in the future. As the saying goes, an ounce of prevention is worth a pound of cure. We recommend you consult with experienced legal counsel as to your precise facts to see whether your stylists are properly classified as employees or independent contractors, and whether AB 1513 is triggered for your salon. Compensation plans and practices can vary significantly from salon-to-salon, so that we recommend seeking advice that is individually tailored to address your specific practices and needs.